

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

DAROLD E. MILLER
Claimant

VS.

APAC KANSAS, INC.
Respondent

AND

**INDEMNITY INSURANCE COMPANY OF
NORTH AMERICA**
Insurance Carrier

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Docket No. 1,030,202

ORDER

Claimant and respondent appeal the December 15, 2008, Award of Administrative Law Judge Brad E. Avery (ALJ). Claimant was found to have suffered a 15 percent whole body functional impairment, followed by a permanent partial general (work) disability of 40.17 percent through January 30, 2008, and 43.67 percent thereafter. Claimant's work disability was based on a 23.33 percent task loss and a 57 percent wage loss through January 30, 2008, and a 64 percent wage loss thereafter.

Claimant appeared by his attorney, Bruce Alan Brumley of Topeka, Kansas. Respondent and its insurance carrier appeared by their attorney, Vincent A. Burnett of Wichita, Kansas.

The Appeals Board (Board) has considered the record and adopts the stipulations contained in the Award of the ALJ. In addition, the parties stipulated to the Board at oral argument that the Stipulation To Post Injury Wage Statement (Wage Stipulation) filed with the Kansas State Workers Compensation Division (Division) on December 4, 2008, correctly identifies the post-injury wage of claimant and may be used for the purposes of determining the nature and extent of claimant's disability in this award. The parties further stipulated that the ALJ's determination that claimant had suffered a 15 percent whole body functional impairment was no longer in dispute. The Board heard oral argument on March 20, 2009.

ISSUE

What is the nature and extent of claimant's disability? Respondent argues that claimant should be limited to his functional impairment as claimant was offered accommodated employment at a comparable wage and failed to put forth a good faith effort to retain that employment. Claimant argues that good faith is no longer the standard in Kansas, citing *Casco*,¹ and, therefore, he is entitled to a wage loss of 100 percent. Additionally, claimant argues that his termination by respondent was done in retaliation for claimant's filing a workers compensation claim. Therefore, the Board should not impute the wage claimant was earning while working for respondent. Claimant argues that a task loss of 23 percent is appropriate in this instance.

FINDINGS OF FACT

Claimant was operating a skid loader for respondent on July 13, 2006, when he injured his lower back from being jarred on the loader. The injury was reported to respondent, and claimant sought medical treatment, initially with Emporia Chiropractic. Claimant then sought treatment with orthopedic surgeon John Estivo, D.O., through November 20, 2006. A lumbar MRI on July 20, 2006, indicated a disc herniation at L5-S1, extending both to the left and to the right. Two lumbar epidural steroid injections and physical therapy provided only temporary relief. Claimant's low back pain was radiating into his right leg, and he was referred for a second opinion and, ultimately, treatment with board certified orthopedic surgeon Douglas C. Burton, M.D., on February 20, 2007. On April 30, 2007, Dr. Burton performed a 360 degree anterior-posterior fusion at L5-S1. The surgery reduced claimant's back pain and eliminated the leg pain. An FCE placed claimant at the medium work level. Dr. Burton released claimant with permanent restrictions including occasional lifting to 50 pounds and frequent lifting to 25 pounds. Claimant was rated at 20 percent to the whole person pursuant to the fourth edition of the *AMA Guides*.² In reviewing the task list of vocational expert Dick Santner, Dr. Burton found, of the 39 tasks on the list, claimant was unable to do 7, for a task loss of 18 percent. Dr. Burton also reviewed the task list of vocational expert Dan Zumalt. Of the 43 non-duplicative tasks on the list, claimant was unable to do 10, for a 16 percent task loss.

Claimant was referred by his attorney to board certified orthopedic surgeon C. Reiff Brown, M.D., for an examination on January 7, 2008. Dr. Brown diagnosed claimant with an L4-L5 herniated disc, post surgery. He rated claimant at 15 percent to the whole body for the surgery, radiculopathy and atrophy of claimant's right calf and thigh. Claimant was

¹ *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, 154 P.3d 494, *reh'g denied* (2007).

² American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

to avoid lifting above 40 pounds occasionally and 30 pounds frequently, and should not lift from below the knees. He was to avoid flexion and rotation of the lumbar spine greater than 30 degrees and was to totally avoid the operation of rough riding vehicles. In reviewing the task list of Dick Santner, Dr. Brown determined that claimant could no longer perform 17 of 39 tasks, for a 44 percent task loss. In reviewing the task list of Dan Zumalt, Dr. Brown determined that claimant could no longer perform 10 of 43 non-duplicative tasks, for a 23 percent task loss.

Claimant was referred by respondent to board certified internal medicine specialist Chris D. Fevurly, M.D., for an evaluation on June 13, 2008. Dr. Fevurly diagnosed claimant with a L5-S1 disc herniation, post surgery. He rated claimant at 10 percent to the whole person under the fourth edition of the *AMA Guides*.³ Claimant was to limit his lifting to 50 pounds on an occasional basis and 35 pounds on a frequent basis, and avoid prolonged bending and stooping. In reviewing the task list of Dan Zumalt, Dr. Fevurly determined that claimant was unable to perform 8 of the 43 non-duplicative tasks, for a 19 percent task loss. In reviewing the task list of Dick Santner, Dr. Fevurly determined that claimant could no longer perform 5 of the 39 tasks, for a 13 percent task loss.

After the accident, claimant returned to work for respondent but at a different job. Claimant was moved to the job of rock crusher because it was easier. The record indicates claimant was being paid the same hourly rate on the rock crusher job, but the hours may have been less. Claimant suffered two separate accidents while working the rock crusher job. On January 15, 2007, and again on January 18, 2007, claimant slipped on ice and fell. He filed claims for those accidents on January 19, 2007. Claimant was fired from his employment with respondent on January 30, 2007. Claimant alleges the termination was due to the filing of the two separate slip and fall accident claims. Respondent argues that claimant's termination was due to job performance issues. Specifically, claimant was discharged due to safety concerns, related to him creating an unsafe and potentially dangerous work environment. One incident involved a broken windshield on one of respondent's vehicles, which claimant did not report in a timely fashion. Phillip Mott, respondent's materials branch manager, testified that the broken windshield violated the mandatory safety requirements of MSHA (the Mine Safety and Health Administration).

In a separate incident while claimant was running the rock crusher, the belt carrying the rock became clogged, and workers had to climb onto the belt and dig off the clog. Respondent contends the belt clog was created intentionally by claimant, which claimant contests. But, according to respondent, while the workers were unclogging the belt, claimant was in the shack where he ran the belt, jeering and laughing at the workers. Claimant was also alleged to have been making gestures with his hands and moving his arms, both directed to the workers on the belt, and dancing. Claimant acknowledges

³ *AMA Guides* (4th ed.).

making the gestures, but testified he was just moving his hands and that he did such things when he became frustrated. He also acknowledged that he was laughing or smiling at the workers at the same time.

Claimant was written up on January 19, 2007, for the windshield incident and the late filing of the January 15, 2007, slip and fall incident. Claimant testified that this was the only time he had been written up by respondent. However, Doug Collar, respondent's quarry foreman and claimant's immediate supervisor, testified that he maintained a diary/calendar indicating when an employee was given a verbal warning. He noted entries showing verbal warnings to claimant on February, 15, 2006; August 22, 23, 29 and 30, 2006; September 7, 2006; and either October 5 or 6, 2006. The August 30 entry indicated claimant was not doing a good job running the crusher and Jim Baker,⁴ one of claimant's co-workers, was put with claimant to retrain him on the operation of the crusher. Mr. Collar thought claimant had been adequately trained on the operation of the crusher after that. However, claimant did not feel the training was adequate. Entries on January 2 and 4 indicated claimant needed to pay more attention to the plant operations. Apparently the impactor (crusher) had plugged again.

Claimant was also counseled on January 17, 2007, about the broken windshield. On that date, claimant advised respondent of the slip and fall earlier in the week. He was counseled about reporting any injury immediately. The incident on January 18, 2007, was described as an almost slip where claimant was possibly caught by a co-worker. The January 19 entry discussed the incident on January 18 and also discussed a situation where claimant refused to get a ladder, which claimant alleged violated his 15-pound lifting restriction in place at that time. However, the ladder was noted to weigh about 15 pounds.

As noted above, claimant was terminated on January 30, 2007, due to job performance and safety concerns. Respondent had determined that claimant had created an unsafe and potentially dangerous work environment. Mr. Mott testified that respondent was able to accommodate claimant's work restrictions, as the 50-pound restriction placed on claimant was less severe than the 15-pound restriction on claimant at the time of his termination.

Claimant testified that respondent treated him differently after the slip and/or fall incidents. Mr. Mott testified that claimant was given more latitude than other employees as respondent was trying to get claimant through the incidents and get him healed up.⁵ However, the safety issues became too much for respondent to overlook. Interestingly,

⁴ Mr. Collar said this employee's name was Jim Barker. (See Collar Depo. at 22.) However, claimant said the employee's name was Jim Baker. (See R.H. Trans. at 18-19, 54 & 56.)

⁵ Mott Depo. at 41.

claimant was provided a safety bonus check on December 21, 2006, for being a safe worker.

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.⁶

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.⁷

If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.⁸

The two phrases "arising out of" and "in the course of," as used in K.S.A. 44-501, et seq.,

. . . have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service. The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment."⁹

⁶ K.S.A. 2006 Supp. 44-501 and K.S.A. 2006 Supp. 44-508(g).

⁷ *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

⁸ K.S.A. 2006 Supp. 44-501(a).

⁹ *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); citing *Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

In determining what, if any, wage loss claimant has suffered, the statute must be read in light of both *Foulk*¹⁰ and *Copeland*.¹¹ In *Foulk*, the Kansas Court of Appeals held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e (the predecessor to the above quoted statute) by refusing an accommodated job that paid a comparable wage. In *Copeland*, the Kansas Court of Appeals held, for the purposes of the wage-loss prong of K.S.A. 44-510e (Furse 1993), that a worker's post-injury wage should be based upon the ability to earn wages, rather than the actual earnings, when the worker failed to make a good faith effort to find appropriate employment after recovering from the work-related accident.

If a finding is made that a good faith effort has not been made, the factfinder [*sic*] will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages. . . .¹²

The events surrounding claimant's injuries are not in dispute. The dispute is with the events leading up to claimant's termination and his job search thereafter. After his injury, claimant was placed in an accommodated position on the rock crusher. This job met his original restrictions of 15 pounds maximum lift, and easily would have met the final restrictions of 50 pounds occasional and 35 pounds frequent lifting. The termination resulted from several incidents, including one where the conveyer belt carrying rocks became clogged and workers had to clear the rocks by hand. Claimant's actions while this clearing was going on, at least partially, led to his termination. Additionally, respondent had records of several other verbal warnings issued to claimant for other infractions. As noted by the ALJ, claimant's actions of mocking his fellow workers were not the actions of an employee trying to retain his employment with respondent. The Board finds that claimant did not put forth a good faith effort to retain his employment with respondent.

Therefore, a wage must be imputed to determine what wage loss claimant suffered. Respondent contends that claimant should be limited to his functional impairment as the wage he would have been earning would have comprised a comparable wage. However, the wage statement placed into evidence by the parties does not support a finding that claimant was earning a wage comparable to claimant's average weekly wage on the date of accident. The parties stipulated that claimant was earning \$723.20 per week on the date of accident, excluding fringe benefits. The Wage Stipulation indicates claimant was earning \$537.05 per week on the average, excluding fringe benefits, while working the

¹⁰ *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

¹¹ *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

¹² *Id.* at 320.

accommodated job. This results in a wage loss of 26 percent during the time claimant worked the accommodated job. Therefore, the actual wages being earned by claimant while working for respondent, post accident, will be used in calculating the wage loss suffered by claimant and the calculation of the resulting work disability under K.S.A. 44-510e.

The ALJ found claimant's task loss to be 23.33 percent. This represents an average of the task loss opinions of Dr. Brown, Dr. Fevurly and Dr. Burton. The Board affirms the finding by the ALJ of claimant's task loss of 23.33 percent.

Claimant argues that Casco has effectively eliminated the good faith aspect of K.S.A. 44-510e. The appellate courts in Kansas have had the opportunity to reverse the good faith element of the statute, but to date have been reluctant to do so.¹³ Until an appellate court determines that the implied good faith element of K.S.A. 44-510e is no longer the law in Kansas, the Board will continue applying the good faith wage loss component.

CONCLUSIONS

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the ALJ should be modified to reflect the correct earnings and subsequent wage loss calculations based on the Wage Stipulation. Claimant did not put forth a good faith effort to retain his employment with respondent. The best wage loss ability displayed by claimant were the actual wages earned while he worked with respondent. Therefore, claimant suffered a wage loss of 26 percent and a task loss of 23.33 percent for a work disability of 24.67 percent.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Brad E. Avery dated December 15, 2008, should be, and is hereby, modified as to the wage loss component of K.S.A. 44-510e, but is affirmed with regard to the task loss percent.

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Darold E. Miller, and against the respondent, APAC Kansas, Inc., and its insurance carrier, Indemnity

¹³ *Gutierrez v. Dold Foods, Inc.*, 40 Kan. App. 2d 1135, 199 P.3d 798 (2009).

Insurance Company of North America, for an accidental injury which occurred July 13, 2006, and based upon an average weekly wage of \$723.20 through January 30, 2007, and an average weekly wage of \$882.13 as of January 31, 2007.

Claimant is entitled to 1.57 weeks of temporary total disability compensation at the rate of \$482.16 per week totaling \$756.99, plus 45.0 weeks of temporary total disability compensation at the rate of \$483.00 per week totaling \$21,735.00, plus 27.14 weeks of permanent partial disability compensation at the rate of \$482.16 per week totaling \$13,085.82 and 67.45 weeks of permanent partial disability compensation at the rate of \$483.00 per week totaling \$32,578.35 for a 24.67 percent work disability, making a total award of \$68,156.16, all of which is due and owing and ordered paid in one lump sum, minus any amounts previously paid.

IT IS SO ORDERED.

Dated this ____ day of July, 2009.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

DISSENT

I respectfully disagree with the majority's holding that claimant's wage loss after leaving respondent's employment should be based upon an imputed wage. First, the greater weight of the evidence indicates respondent did not comply with its own rules regarding termination as set forth in the company handbook. Accordingly, respondent did

not act in good faith in terminating claimant's employment. Second, claimant made a good faith effort to obtain employment following his termination by respondent and, therefore, his actual wage loss percentage should be used to compute claimant's permanent partial disability benefits under K.S.A. 44-510e. The majority holds, in essence, that a worker is permanently branded with a finding of failing to make a good faith effort to retain employment regardless of later good faith efforts to find other employment. And third, K.S.A. 44-510e provides that the wage loss prong of the permanent partial general disability formula is determined by comparing the average weekly wage the worker was earning at the time of the injury to the average weekly wage the worker *is* earning after the injury.

The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, **averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.** In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury. (Emphasis added.)¹⁴

Accordingly, I would compute claimant's permanent partial disability benefits based upon his actual post-injury wages.

BOARD MEMBER

c: Bruce Alan Brumley, Attorney for Claimant
Vincent A. Burnett, Attorney for Respondent and its Insurance Carrier
Brad E. Avery, Administrative Law Judge

¹⁴ K.S.A. 44-510e(a).